IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

HARTFORD LIFE INSURANCE COMPANY, Petitioner, vs. FRANK F. DOUDS, HERMAN J. DOUDS and REBECCA E. McCONKEY, Executors of the Last Will and Testament of ALONZO J. DOUDS, Deceased, Respondents.	No. 265.

BRIEF OF PETITIONER, HARTFORD LIFE INSURANCE CO.

STATEMENT.

May It Please the Court:

Petitioner is a corporation, organized under the laws of Connecticut, having its home office in the City of Hartford in that state, where in its Safety Fund De-

partment, and as trustee for the holders of certificates in that department, it is now and has been, for many years past, operating and conducting a life insurance business on the assessment or mutual plan.

On November 10, -1916, Alonzo J. Douds, a citizen and resident of Ohio, and the holder of three certificates of membership for $1,000 each, issued in 1883 in the Safety Fund Department of petitioner, filed suit against petitioner in the Court of Common Pleas, Franklin County, State of Ohio, in which it was averred (Rec., p. 6) that from and since the year 1898 petitioner had been levying assessments against him under these certificates which were excessive in amount and in excess of the rate of assessment specified in the table of rates incorporated in his certificates; that the amount of the excess of such assessments was to him unknown, but that the same amounted to about the sum of $900. Upon these averments Douds prayed (1) for an accounting to determine the amount of the excess of the assessments paid by him under his certificates; (2) for a money judgment for the amount of the excess of the assessments, with interest, found to have been paid by him upon such accounting, and (3) for an injunction to restrain petitioner from thereafter levying assessments against him under said

certificates in excess of what the Ohio Court should determine to be the lawful and proper rate of assessment.

To this bill of complaint petitioner demurred on the ground that it appeared from the averments of the bill that the Ohio Court had no jurisdiction of the subject matter of the suit. This demurrer was overruled (Rec., p. 3) and petitioner, being ordered so to do (Rec., p. 4), filed its answer, in which it reasserted the lack of jurisdiction of the Ohio Court over the subject matter of this suit and that the Court was without power to grant the relief prayed for therein; that the suit appertained to the internal affairs of petitioner, over which the Ohio Court had no jurisdiction or power to regulate or control and that the exercise of jurisdiction in this suit by the Ohio Court, and the granting of the relief prayed for therein, would deprive petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Federal Constitution (Rec., p. 19).

Upon the filing of this answer the trial court referred the cause to a referee to take an accounting and to report to the Court his findings and conclusions of law upon such accounting (Rec., p. 4).

Thereafter the Referee filed his report (Rec., p. 27) in which he found that the assessments levied against Bonds under these certificates since 1898 were exces-

sive, and in excess of the rate of assessment specified therein; determined what the proper or lawful rate of assessment should have been thereunder; found that the excess of such assessments amounted to $1,857.15, and recommended the granting of the relief prayed for in the bill.

Douds died shortly after the filing of this report, and the cause was revived in the name of the respondents as his personal representatives (Rec., p. 4).

Thereafter, and in conformity with the findings of the Referee, judgment was entered by the Court of Common Pleas against petitioner and in favor of respondents for the sum of $1,857.15 as the amount of the excess of the assessments paid by Douds under these certificates since 1898. The Court did not decree the injunctive relief prayed for in the bill.

From this judgment petitioners appealed to the Court of Appeals for Franklin County, Ohio (Rec., p. 55). The judgment was thereafter affirmed by that Court (Rec., pp. 55-56), whereupon, on motion of petitioner, the appeal was certified to the Ohio Supreme Court (Rec., p. 133). On November 15th, 1921, the judgment of the Ohio Court of Appeals was affirmed by the Ohio Supreme Court (Res., p. 133), following which the petitioner applied to this Court for a writ of certiorari to review the judgment of the Ohio Supreme Court.

The question here presented for determination is: Did the Ohio Court have jurisdiction of the subject matter of this suit? It is the insistence that it did not; that the suit involved (1) the *internal affairs* and management of petitioner, a *foreign* corporation, and (2) the *validity* of *acts* performed by petitioner in the management and operation of the safety fund department, as *trustee*, for the members or certificate holders in that department, over which the courts of Connecticut had sole and exclusive jurisdiction; that the exercise of jurisdiction by the Ohio courts in this suit was an invasion of the exclusive sovereign powers of the State of Connecticut and the judgment rendered by the Ohio court deprived petitioner of its property without due process of law contrary to and in violation of the Fourteenth Amendment to the Federal Constitution, because that court was without jurisdiction of the subject matter of the suit. The privilege and immunity so claimed by petitioner under the Federal Constitution was asserted by it from the beginning of this litigation and reasserted at every stage of the proceeding. That the privilege so asserted by petitioner under the Federal Constitution was denied by the Ohio Supreme Court appears from the following portion of the syllabus of that Court to its opinion rendered herein (Rec., p. 134):

"1. Upon the filing of a petition in an Ohio court of competent jurisdiction by one of its citizens against a foreign insurance company, based upon a contract for insurance issued by such foreign insurance company to such citizen, such court, upon proper service of summons, has jurisdiction of the subject matter to render a money judgment for the amount found due upon such contract, and upon proper proof to make an accounting and render judgment for all sums of money wrongfully obtained under color of such contract; and the exercise of such jurisdiction and the rendering of such judgment do not interfere with the discretion, the internal management or the control of such company, *and are not in violation of the Fourteenth Amendment of the Constitution of the United States.*"

SPECIFICATION OF ERRORS.

Petitioner relies upon the following errors in support of its prayer for the reversal of the judgment of the Supreme Court of Ohio herein:

1. The claim of Douds, as a member of the Safety Fund Department of petitioner, that the assessments previously levied against him under his certificate were illegal and excessive, and his bill herein for an accounting to determine the amount of the excess of these alleged excessive assessments and for a money judgment for the excess of the assessments found to have been paid by him upon such accounting had to do with the *internal affairs* and *management* of petitioner, a Connecticut corporation, over which the courts of Ohio had no jurisdiction, and the exercise of such jurisdiction and the rendition of the judgment complained of herein by the Ohio court deprives petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Federal Constitution.

2. The Ohio Supreme Court erred in holding that the exercise of jurisdiction in this cause and the rendition of the judgment herein by the Ohio Court did not deprive petitioner of its property without due

process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The subject matter of this suit likewise involved the validity of acts performed by petitioner *as trustee* in the management and operation of its Safety Fund Department in the State of Connecticut, over which the courts of Connecticut had sole and exclusive jurisdiction, and the exercise of jurisdiction and the rendition of the judgment complained of herein by the Ohio Court deprived petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Federal Constitution; and the Ohio Supreme Court erred in holding that the exercise of jurisdiction by the courts of that state and the rendition of the judgment complained of herein did not deprive petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

POINTS AND AUTHORITIES.

I.

Jurisdiction of the *subject matter* of an action is an essential prerequisite to due process of law. The exercise of jurisdiction by a court of one state where the courts of another state have exclusive jurisdiction of the subject matter of the action is a *denial* of *due process of law* and a judgment in such an action deprives the defendant of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

Scott v. McNeal, 154 U. S. 34, 46;
Pennoyer v. Neff, 95 U. S. 714, 720;
Riverside Mills v. Menefee, 237 U. S. 189;
New York Life Ins. Co. v. Dunlevy, 241 U. S. 518;
Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8.

II.

(a) A suit by a member of a mutual or assessment insurance company to determine the validity of assessments previously levied against him under his certificate, and for an accounting to determine the amount of the excess of the assessments paid and

for a money judgment for the amount of the excess of the assessments found to have been paid by the member upon such an accounting, constitutes and involves an interference with the internal affairs and management of such a company, over which the courts of the state, other than that where the company is incorporated and where it conducts and operates its business, have no jurisdiction.

Condon v. Mutual Reserve Fund Life Assoc., 89 Md. 99, 42 Atl. 944;

Hartford Life Ins. Co. v. Ibs, 237 U. S. 665, 671;

Sauerbrunn v. Hartford Life Ins. Co., 220 N. Y. 363, 115 W. E. 1001;

State ex rel. Hartford Life Ins. Co. v. Shain, 245 Mo. 78, 149 S. W. 868;

State ex rel. Minnesota Mutual Life Ins. Co. v. Denton, 229 Mo. 187, 129 S. W. 709;

Eberhard v. Northwestern Mutual Life Ins. Co., 210 Fed. 520;

Taylor v. Mutual Reserve Fund Life Assoc., 97 Va. 60, 33 S. E. 385;

Howard v. Mutual Reserve Fund Life Assoc., 125 N. C. 49, 34 S. E. 199;

Clark v. Mutual Reserve Fund Life Assoc., 14 App. D. C. 154;

Richards v. Security Mutual Life Ins. Co., 119 N. E. 744 (Mass.);

Royal Fraternal Union v. Lundy, 51 Tex. Civ. App. 637, 113 S. W. 185;

Olsen v. Danish Brotherhood in America, 184 N. W. 178 (Minn.);
Boyette v. Preston Motors Corp., 89 So. 746 (Ala.);
Hogue v. American Steel Foundries, 247 Pa. 12. 92 Atl. 1073.

(b) Nor does the fact that the foreign corporation is licensed to do business in the state in which the suit is instituted confer upon the courts of the latter state the power or jurisdiction to regulate the internal affairs of such company.

Guilford v. Western Union Telegraph Co., 59 Minn, 332, 61 Mo. 324;
Tolbert v. Modern Woodmen of America, 145 Pac. 183 (Wash.);
Howard v. Mutual Reserve Fund Life Assoc., 125 N. C. 49, 34 S. E. 199;
Taylor v. Mutual Reserve Fund Life Assoc., 97 Va. 60, 33 S. E. 385;
New York Life Ins. Co. v. Head, 234 U. S. 149;
State ex rel. Minnesota Mutual Life Ins. Co. v. Denton, 229 Mo. 187.

III.

A court has no power or jurisdiction to control or regulate a *foreign* trustee in the management and operation of a trust in a *foreign* state.

Hartford Life Ins. Co. v. Ibs, 237 U. S. 662;
Lines v. Lines, 142 Pa. St. 149, 21 Atl. 809;
22 Encyc. of Pl. & Pr., p. 21.

IV.

The courts of Connecticut have already adjudicated respecting the subject matter of this suit.

Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 668.

V.

An examination of petitioner's books and records was necessary in order to determine the validity of the assessments complained of and the excess, if any, of such assessments paid by Douds. The evidence in this case was insufficient to justify either the finding of the Ohio Court that these assessments were excessive or the judgment entered upon such finding for the amount of the claimed excess of such assessments.

ARGUMENT.

I.

A Judgment Against a Defendant in an Action in Which the Court Is Without Jurisdiction Deprives Defendant of Its Property Without Due Process of Law.

If, as we claim, the Ohio Court had no jurisdiction of the subject matter of this suit, then the exercise of jurisdiction and the rendition by that Court of the judgment herein was a denial of due process of law and deprived the petitioner of its property without due process of law in contravention of the Fourteenth Amendment to the Federal Constitution.

In Scott v. McNeal, 154 U. S. 34, 46, it was said:

> "No judgment of a court is *due process of law* if rendered without *jurisdiction*. * * *"

In Pennoyer v. Neff, 95 U. S. 714, 720, the Court in holding that the authority of a judicial tribunal of a state is restricted to the territorial limits of the state of its creation, said:

> "The authority of every tribunal is necessarily *restricted* by the *territorial limits* of the state in which it is *established*. Any attempt to *exercise*

authority beyond these limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power and resisted as mere abuse. * * * Since the adoption of the Fourteenth Amendment to the Federal Constitution the validity of *such* judgments may be *directly questioned*, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of the parties do not constitute due process of law."

II.

The Subject Matter of This Suit Involved an Interference With the Internal Affairs of Petitioner.

A suit which, as here, has to do with the proper rate of assessment levied by a mutual or assessment company against its members, and for an accounting to determine the amount of the excess of the alleged excessive assessments claimed to have been levied against the member under his certificate, is inherently dealing with the internal affairs of the company. Such assessments are only levied upon members, and only members are interested in the rate of frequency, or method of assessment. The process represents the collection of money for the purpose of paying the same to the beneficiaries of deceased members. Indeed, the company performs no other function. And not only that, but if we judge the situation by the

terms of the contract, petitioner has doubtless long since paid to the beneficiaries of deceased members the money which the Ohio Court now holds was excessively collected from Douds, and the judgment in this case, if valid, must be paid out of the proceeds of assessments collected from other members under their certificates. Manifestly, therefore, the question of the validity of these assessments, and the right of Douds to the return of the excess of these alleged excessive assessments, directly and vitally concerns each and every one of the members of the Safety Fund Department of petitioner. Indeed, the acts here complained of not only affect the relation of the members of the Safety Fund Department to one another, but if Douds is entitled, as the Ohio Court holds, to the return of the excess of these alleged excessive assessments, then his fellow members will have to repay the same to him, notwithstanding that they, too, have also paid the assessments which the Ohio Courts hold to be illegal and excessive. One of the earliest, and probably the leading, case on the question here involved is Condon v. Mutual Reserve, 89 Md. 99, 42 Atl. 944. That was a suit instituted in Maryland by a member of the Mutual Reserve Fund Life Association, an assessment company incorporated under the laws of the State of New York, in which it was alleged, as here, that the assessments previously levied against the plaintiff under his certificate were in excess of the

rate of assessment therein provided for. And in that case, as here, the relief prayed by plaintiff was:

1. For an accounting to determine the amount of the excess of the assessments previously paid.

2. A money judgment for the amount of the excess of such assessments as determined by such accounting.

3. An injunction to restrain the company from thereafter assessing plaintiff in excess of the rate specified in the certificate.

The Maryland Court held that the suit involved an interference with the internal affairs of the defendant, over which the courts of the state had no jurisdiction, and said:

> "With this limit to the court's jurisdiction established, it becomes necessary to ascertain what is and what is not a controversy relating solely to the *internal* management of a corporation; in other words, what acts are so distinctively acts pertaining to the internal management of a foreign corporation as to preclude an inquiry into them by any tribunal other than the courts of the corporation's domicile. * * * In Field's case, *supra* (64 Md. 151), which has been followed by many other courts of the country, it was said: 'Where the act complained of *affects* the complainant solely in his *capacity* as a member of the *corporation*, whether it be a stock-

holder, director, president, or other officer, and *is the act of the corporation*, whether acting in stockholders' meeting or through its agents, the board of directors, *then such action is the management of the internal affairs* of the corporation, and in case of a foreign corporation, our courts will not take jurisdiction.' * * *

"We turn now to the allegations of the bill to ascertain whether the acts complained of are, according to the definition in Field's case, acts of internal management or not. Laying aside for the moment the question as to whether the certificate of membership, by its terms, authorizes an increase in the amount of the assessments above $3.25 per $1,000 of insurance, and permits the levying of more than the designated bimonthly ones, it is obvious, we think, that the *whole fabric of the bill with respect to these alleged illegal assessments involves*, as its foundation, *the right of* a Maryland court to inquire into *the internal management of this New York corporation*. The *substance* of the *allegations* of the bill, as we have heretofore stated them on this subject, is that *these excessive assessments are not only* void, because not authorized, but because the condition of the death fund not demanding that they should be laid, they were made with the dishonest and fraudulent purpose of forcing the appellant's policy, and the policies of others similarly situated, to lapse. Now, it is perfectly apparent that no tribunal can possibly decide whether the condition of the death fund required these extra assessments to be levied, until it

knows what the condition of the death fund was and what demands there were upon it. And it is equally clear that, in order that these factors may be known, the whole internal management of the association must be investigated. *The disposition made of the money assessed* for, *and payable to*, the *death* fund, the *validity of claims against* that fund, *the propriety of expenditures charged* against it, and other like inquiries, *strictly relating to the internal management* and to the proper disbursement of the money which the many thousand members have intrusted to the director's control, would all have to be solved, before a court could say that these assessments were unnecessary or fraudulent. No court could declare them excessive until it knew what sum was not excessive, and no court could decide what sum was not excessive until it was placed in the full possession of all the facts pertaining to the whole internal conduct of the company. These observations apply, also, to the charges of the bill in respect to the amount of the reserve fund bonds issued to Condon. It is alleged that a true accounting will show him entitled to bonds for larger amounts. A *true* accounting can only be had by an examination of all the entries relating to this fund, and by correcting errors, if any there are. Obviously, this would involve a control of the company's *internal affairs* by the agency of an injunction issued by a Maryland court, though that court possesses no power to enforce the injunction if its commands were treated with contumely by the corporation. *These*

matters thus complained of do not affect the appellant's individual rights solely. They relate also to *the rights, and bear upon the liabilities, of every other member as an insurer;* and while in a sense they may, by their consequences, affect him individually, as assured, they do not affect him *exclusively*, but *concern, as well*, the *internal management of the company.* His relation to the corporation is, as we have stated, of a two-fold character. He is insurer and insured. It is possible that the same act of the body-corporate may affect both of these relations. In that event, it could not be said that the act affected a member's individual rights only."

* * * * * * *

"*Every right* asserted by *Condon is a right* founded on *his membership* * * * in *respect of some matter pertaining to the management and internal government* of the association. While the acts complained of may affect him, they do not affect him alone, and *they only affect him in any* way *because of* his *membership.* If these acts are unwarranted, they are certainly not more grave than the forfeiture of Field's stock for the nonpayment of an illegal and void assessment. And if the latter gave no ground for the interposition of a court of equity, because it was an act of internal management done by a foreign corporation, it is difficult to see how the former can be classed as acts affecting only the individual rights of Condon. In Field's case an injury was done to him by the misconduct complained of, but the injury was not an injury solely to his

individual rights. The act which occasioned the wrong was a corporate act, relating to the internal government of the company. Its effect upon him did not deprive it of its character as a corporate act. The results to Condon do not define the nature of the acts which he complains of, or prevent them, because they do him injury as he alleges, from being acts pertaining to the internal government of a foreign corporation of which he is a member. Were he suing on the contract of insurance, the situation would be different."

And, in holding that the courts of the state where a company is incorporated have sole and exclusive jurisdiction of suits involving the internal affairs of such company, the Court said:

"A policyholder in a mutual insurance association stands in a *twofold* relation towards the company. He is a *policyholder* and he is a *member*. * * * He is alike insurer and insured, but in both capacities he is a member, and it is solely because he is a member that he occupies either of these positions. His liabilities as insurer and his rights as insured depend wholly upon the obligations and conditions of his membership. Those obligations and conditions are evidenced by the constitution and the by-laws of the association, and by his application for, and his certificate of, membership, and by the law of the place of the contract. Apart from these, there is nothing by which his duties and his rights as

a member are to be determined. *Rights* as an *insured* he undoubtedly has. Those *rights* may be unlawfully invaded. If thus *invaded*, he is not without redress when he *seeks* relief *in the forum* having *jurisdiction* over the *parties* and the *subject matter*. The mere fact that he is a *member* of the corporation does *not preclude* him from asserting against the corporation any right arising out of his *contract*, but the character of the *remedy invoked* may measure the *limits* of *the jurisdiction* of the tribunal appealed to, when the *domicile of the corporation is considered*. It is therefore entirely possible that a state of facts which would authorize a court in the exercise of its visitorial power, to inquire into the validity of acts *affecting the rights of a policyholder*, when done by a corporation *located within the jurisdiction of the court*, would, as *respects a foreign corporation, be wholly insufficient* to *confer* upon the *same court jurisdiction* to act at all. * * * This *litigation was not* instituted to *recover* on the policy a sum payable under it for a loss actually sustained. *Its object*, as will be shown later on, is to *regulate by a decree* of the Circuit Court of Baltimore City, the management, the conduct, and the *internal government of a foreign corporation* * * *."

The ruling of the Maryland Court in the Condon case, *supra*, was cited with approval by this Court in Hartford Life Insurance Company v. Ibs, 237 U. S. 665. The Ibs case reached this Court on a writ of error to the Supreme Court of Minnesota and was

an action on the certificate of a deceased member for a recovery of the benefits promised by the certificate or contract upon the death of the member. In the course of its opinion in the Ibs case this Court, in holding that the courts of Connecticut had jurisdiction of all matters appertaining to the internal affairs of your petitioner, said (*l. c.* 671):

> "For—whether the members of the 'Safety Fund Department' are regarded as occupying a position analogous to that of shareholders; or are treated as beneficiaries of trust property in the hands of the company, as trustee, in the State of Connecticut—the courts of that state had *jurisdiction* of all *questions relating to the internal management* of the *corporation* (Selig v. Hamilton, 234 U. S. 652; Insurance Co. v. Harris, 97 U. S. 336; Condon v. Mutual Reserve, 89 Maryland 99; Maguire v. Mortgage Co., 203 Fed. Rep. 858)."

The language used, as well as the authorities cited, indicates that when this Court said that the courts of Connecticut had jurisdiction of all questions relating to the internal management, it meant *exclusive* jurisdiction. For instance, one of the cases cited is Selig v. Hamilton, 234 U. S. 652, where it was held that the jurisdiction of the Minnesota courts to determine the necessity and amount of an assessment to be levied against a stockholder of an insolvent Minne-

sota corporation was *exclusive* of any inquiry by the courts of New York into that question, even though such stockholder resided in that state.

Another of the cases cited is that of Maguire v. Mortgage Co., 203 Fed. 858, where the Circuit Court of Appeals for the Second Circuit held that the jurisdiction of the domiciliary court to wind up the affairs of an insolvent corporation was *exclusive* of a *similar jurisdiction in any other court.*

And in the following cases, which were similar to the Condon case, supra, and to the case at bar, it was held that a suit by a member against a foreign assessment company to recover back the excess of prior assessments, which were claimed to be illegal and excessive, and for an accounting to determine the amount of the excess of such assessments and for an injunction to enjoin the company from levying assessments in excess of that fixed by the Court, involved an interference with the internal affairs of the foreign company over which the courts had no jurisdiction.

Howard v. Mutual Reserve Fund Life Assoc., 125 N. C. 49, 34 S. E. 199;

Clark v. Mutual Reserve Fund Life Assoc., 14 App. D. C. 154;

Taylor v. Mutual Reserve Fund Life Assoc., 97 Va. 60, 33 S. E. 385;

Eberhard v. Northwestern Mutual Life Ins. Co., 210 Fed. 520;
Richards v. Security Mutual Life Ins. Co., 119 W. E. 744 (Mass.);
Royal Fraternal Union v. Lundy, 51 Tex. Civ. App. 637, 113 S. W. 185.

In Sauerbrunn v. Hartford Life Ins. Co., 220 N. Y. 363, 115 W. E. 1001, and State ex rel. Hartford Life Ins. Co. v. Shain, 245 Mo. 78, 149 S. W. 868, which were analogous to the case at bar, the courts of last resort in New York and Missouri held that the subject matter of the suit involved the internal affairs of petitioner over which the courts of those states had no jurisdiction.

In the Sauerbrunn case, supra, the Court said:

> "The trend of decisions of the courts is contrary to assumption of jurisdiction by the courts of the action at bar. We may assume that the membership of the defendant corporation extends throughout a number of states, and while it may be said that the present action affects the plaintiff alone, we cannot overlook the fact that if the various states assume jurisdiction in like actions the decisions of the courts might be divergent, different rules of law would prevail and a corporation might be called upon to account in various states and relieved therefrom by the decrees of the courts in other states. Likewise, it might be held legal for it to increase assessments

> in certain jurisdictions and illegal to increase and collect the same in other jurisdictions. * * * Numerous jurisdictions have determined that an action like unto the one at bar is one relating to the internal affairs of a corporation of which the courts will *decline* to assume *jurisdiction* (Clark v. Mutual Reserve, 14 App. D. C. 154; State *ex rel.* Minnesota Mutual Life Ins. Co. v. Denton, 229 Mo. 187; State *ex rel.* Hartford Life Ins. Co. v. Shain, 245 Mo. 87; Taylor v. Mutual Reserve, 97 Va. 60; Royal Fraternal Ass'n v. Lundy, 51 Tex. Civ. Ap. 640; Condon v. Mutual Reserve, 89 Md. 99, approved in Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, citing additional cases; Eberhard v. Northwestern Mutual, 210 Fed. 520). The *reasoning* of the courts in the cases cited is forceful and meets with our *approval*."

And in the Shain case, *supra*, the Missouri Court, after an exhaustive review of the authorities, in concluding, said:

> "Entertaining these views of the law, in our opinion, the Circuit Court of Pettis County has no jurisdiction to take the accounting prayed for, nor to grant the relief asked."

In Olsen v. Danish Brotherhood in America, 184 N. W. 178, the Supreme Court of Minnesota held that the courts of Minnesota had no jurisdiction in a suit brought in that state by a member of an

assessment company organized under the law of another state to determine the validity of assessments levied by the defendant company as such matters appertained to the company's internal affairs, and said:

> "But it is quite apparent that *fixing rates* and benefits of a corporation of this kind pertains to the management of its internal affairs. Benefits promised must come from *rates paid* or *assessments levied* against the members. The ***very existence*** of the corporation depends upon a proper adjustment of *rates* and *benefits*. How this is to be done is peculiarly a problem of *internal* management, to be solved by the governing body of the corporation or by delegates of its members in convention assembled. * * * It is apparent that, if all action of the nature here pleaded may be maintained in every state where the corporation has members, uniformity of either assessments or benefits could not be hoped for. The courts of one state might hold changes made by the corporation valid, while courts of other states declare them void. No association of the sort here involved, having members in different states, could well survive a condition where the courts of a state other than its domicile step in and determine for the future what the assessments and benefits of its members in such state shall be. The disaster likely to result to foreign fraternal beneficiary associations of actions of the instant type lie, may well cause courts to pause before assuming jurisdiction.

Especially so in view of the decision in Royal Arcanum v. Green, 237 U. S. 531, where it was held that an adjudication as to rates and benefits by the courts of the domicile of the corporation finds its members wherever residing. Some courts also give it as a reason for declining to assume jurisdiction over affairs relating to the internal management of a foreign corporation that neither its officers or governing body, nor its records are within the reach of the decrees of, orders, or processes of any courts except the courts of its domicile.

"This Court has repeatedly recognized the rule that equity will not take jurisdiction of action wherein it is sought to interfere with the internal management of a foreign corporation (Guilford v. Western Union Telegraph Co., 59 Minn. 332, 61 N. W. 324; Selover v. Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344; State ex rel. v. De Groat, 109 Minn. 168, 123 N. W. 417; Gere v. Dorr, 114 Minn. 240, 130 N. W. 1022; Van Dyke v. Railway Mail Assoc., 118 Minn. 390, 137 N. W. 15; Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

"In our opinion the amended complaint shows on its face that the action is one in which a court of this state is asked to interfere with the internal management of a foreign corporation. Jurisdictions should not be assumed for that purpose, and the demurrer should be sustained."

In State ex rel. Minnesota Mutual Life Ins. Co. v. Denton, 229 Mo. 187, the plaintiff, a member of an

assessment insurance company, incorporated under the laws of Minnesota, instituted suit in Missouri, asserting that the defendant had illegally increased the assessments under his certificate and praying, among other things, for an accounting to determine the amount of the excess of these alleged excessive assessments and a money judgment for the excess of the assessments found to have been paid by him upon such accounting. The Court held that these matters involved the internal affairs of the defendant over which the courts of Missouri had no jurisdiction, and said, *l. c.* 199:

> "There are, according to the petition, a large number of holders of policies like those held by plaintiff, scattered perhaps over many states, each of whom has as much right to bring a like suit in his state as the plaintiff has to bring this suit. Each of those many policyholders would have an interest in each of the many suits, because in a mutual concern the interest of one cannot be determined without determining the interest of all, or at least the basis on which the interest of all must be calculated. It would be a strange system of law that would involve a concern in such confusion. If such were the law no insurance company would venture to do business outside its own state."

In Boyette v. Preston Motors Corp., 89 So. 746, the Supreme Court of Alabama, in holding that a suit in

Alabama to compel the issuance by the defendant, a Delaware corporation, of a certain amount of its capital stock involved an interference with the internal affairs of defendant, over which the courts of Alabama had no jurisdiction, said:

> "The bill of complaint shows clearly that the only injury, if any, the complainant Boyette may have sustained by reason of the alleged wrong of the officers and directors of the Motor Car Company was a *common* injury, which *he* and *all* the *other stockholders* of the old company *sustained*, and his claim is differential in *no* respect from the *rights* of the *other stockholders*, except as to the number of shares owned by each stockholder. Therefore, it necessarily follows that a decision in this case as to the *liability vel non* of the Motors Corporation, or its officers, will establish a precedent for the other claims, and hence the Court must say what principle and what circumstances under the laws of Delaware regulate the creation, merger, etc., of corporations in such state, and *regulate* the *relation* of *stockholders* in such corporation to *each* other and to the corporations. This claim cannot be *established* and finally *adjudicated* by the *Alabama* courts, and *have due regard* to the *sovereignty* of the State of *Delaware* over all corporations created by it."

In Hogue v. American Steel Foundries, 247 Pa. 12, 92 Atl. 1073, the Court held that an action by a stockholder, who had declined to consent to a reorganiza-

tion of defendant, a foreign corporation, and had retained his original stock, to recover accumulated dividends, involved an interference with the internal affairs of defendant, over which the courts of Pennsylvania had no jurisdiction. The Court said:

> "The determination of the question thus raised would require us to investigate and determine the validity of the plan of reorganization, and would require us to ascertain and *pronounce* upon the *rights* of original *stockholders, as between themselves* and *their own corporation.* These questions are, we think, for the *New Jersey* courts *to determine*, as arising under the local law. If any wrong has been done to plaintiffs, by the process of reorganization, that wrong must be ascertained, and the remedy applied according to the law of the domicile of the corporation. The *action* of which plaintiffs here *complain* is *not* something which affects *merely* their *own individual* rights. It *concerns* the *rights* of *all* the *nonassenting holders of preferred stock.* The validity of the action taken by the company depends upon the legality of the reorganization proceedings, under which the old preferred stock, and the old common stock, were retired, and new stock of but one class was issued in lieu thereof. It seems quite clear that the prosecution of such an inquiry would involve interference with the management of the internal affairs of a foreign corporation."

The contrary conclusion arrived at by the Ohio Supreme Court in this case and by the Iowa Supreme Court in Frick v. Hartford Life Ins. Co., 159 N. W. 247, is predicated upon the erroneous assumption that if, in a suit of this character, the courts had no jurisdiction or power to determine the validity of assessments previously paid by a member and to take an accounting for the purpose of determining the amount of the excess of the assessments so paid and to render a money judgment against petitioner for the amount of the excess of the assessments found to have been paid upon such an accounting, *then* the *courts* would have *no jurisdiction* in *an action brought upon the certificate* or policy by the beneficiary *after the insured's death.* The courts in those cases, however, overlooked the fundamental difference and distinction between a suit by a *member* during his lifetime involving the validity or legality of assessments levied against him by the company and an action *on* the certificate or policy to recover the benefits promised thereby after the member's death. In an action by the beneficiary *on* the certificate or policy after the member's death to recover the benefits promised, the *subject matter* of the action is the *contract*, and its alleged *breach* by the company, and if the Court has jurisdiction of the defendant's person, it may, of course, proceed to a final determination of the cause even though there is

incidentally or collaterally involved the question of the validity of an assessment levied against the insured thereunder. On the other hand, in a suit by a member of the company during his lifetime to have the foreign court determine the validity of assessments previously levied against him by the company and for an accounting and money judgment for the amount of the alleged excess of such assessments, the subject matter of the suit is not only the legality and validity of acts performed by the foreign company in a foreign jurisdiction, but acts which affect all of the members in their relation to one another. In so far as the *foreign* court assumes to control these matters, it controls and ousts the *domestic* court. And not only that, but to the extent that the adjudications of the courts of the various jurisdictions conflict respecting the validity of the assessments, petitioner is ground between the upper and nether millstones. The courts in the cases already cited have recognized the difference between an action *on* the certificate by the beneficiary after the insured's death and a suit of the character here involved, on the question of jurisdiction.

In the Condon case, *supra*, the Court in this connection said:

> "If this were a *suit on an insurance policy* to recover a *loss insured against*, it would be a case

within the jurisdiction of the courts of Maryland. In such a proceeding, it would be incumbent on the Court to construe the policy and to determine whether it had been forfeited or not, because it would have the authority to decide whether a recovery could be had. Necessarily, therefore, the *validity of any assessment*, and the inquiry as to whether an assessment was fraudulent would be a legitimate inquiry; because in a *suit on the policy* in Maryland the courts of this state *would not be* called on to regulate, by injunction or otherwise, the *government of a foreign corporation*, *but* would be required merely to *enforce* the contract or award damages for its breach. There is a broad difference between compelling a *foreign* corporation, at the *suit* of a *member, to conform* its *internal conduct* to the views of a *Maryland court*, and adjudging it, at the *suit* of the beneficiary, liable in damages for a failure to comply with its contract of indemnity."

In the case of Sauerbrunn v. Hartford Life Ins. Co., 220 N. Y. 365, 115 N. E. 1001, it is said:

"[7] That our courts might entertain jurisdiction of *an action* brought against defendant to *recover for the death of a member* and in such action to determine whether or not the policy was in force, the validity of an assessment made for nonpayment of which forfeiture was claimed, cannot be questioned. *Such an action does not correspond to the action at bar* wherein the court is invoked to exercise *visitorial powers* to review

and decree *how* the acts of a corporation which derives its authority from *the law of another state shall exercise such power.*"

And in the case of Howard v. Mutual Reserve, 125 N. C. 49, 34 S. E. 199, it was said:

> "So, too, if this suit *was* for the recovery of the amount *due on the policy by the beneficiary,* if the defendant had declared the policy forfeited because of a failure to pay the increased assessments, the *matter would be within the jurisdiction* of our court. In *such* a suit, the courts would be compelled to pass upon the question as to whether the assessments were illegal and fraudulent, to interpret the policy, and to determine whether the amount of the policy could be recovered. In *such* a suit, the courts of North Carolina would *not be required to regulate* by injunction the internal management of a *foreign* corporation, but would be called upon simply to *enforce the contract of* insurance between the parties, or to assess and adjudge damages for its breach. *But the subject matter* and the officers of the defendant *are beyond the jurisdiction of our courts* in this case, *and* the remedy sought is not in *our power* to grant."

Nor does the fact that petitioner was licensed to do business as a foreign insurance company in Ohio confer upon the courts of that state the right and power to control its internal affairs. The internal

affairs of a corporation are within the exclusive sovereignty or domain of the state which created such corporation. As was said by the Minnesota Court in Guilford v. Western Union Telegraph Co., 59 Minn. 332, 61 N. W. 324:

> "The doctrine is well settled that courts will not exercise visitorial powers over foreign corporations, or interfere with the management of their internal affairs. *Such* matters *must* be settled by the courts creating the corporation. This rule rests upon a *broader and deeper foundation* than mere *want of jurisdiction* in the *ordinary* sense of that word. It *involves* the *extent* of the *authority of the state* (from which its courts derive all their powers) over *foreign* corporations."

In case of Howard v. Mutual Reserve Fund Life Assoc., *supra* (125 N. C. 49, 34 S. E. 199, the Court, in holding that the statute of North Carolina providing for service of process upon foreign corporations did not confer upon the courts of that state the power or jurisdiction to regulate or control the internal affairs of such a corporation, said:

> "These provisions of our law had for their object the securing for suitors in our courts of the benefits of our own laws, and the conferring upon our courts jurisdiction to declare and enforce their rights when the matters which were

> the subject of litigation were in their jurisdiction or the remedy sought could be granted. They were not intended to give our courts jurisdiction over the persons who are the officers of a foreign corporation residing in another state, and over the *internal management* of such corporations over which our courts would be powerless to exercise any control or to enforce obedience to any of their orders."

In Tolbert v. Modern Woodmen of America, 145 Pa. 183, the Supreme Court of Washington, in holding that because the statutes of that state authorized foreign insurance companies to do business therein did not confer upon the courts of that state extra territorial jurisdiction to interfere with the internal affairs of such a corporation, after quoting from Taylor Mutual Reserve, *supra*, said:

> "This is of value in showing that the fact that the *statutes* of a state make provisions for *admitting* of *foreign* life insurance *associations* to do business therein, and for appointment of an agent upon whom service of process may be made, do not enable the courts of the state to exercise *extraterritorial* jurisdiction to the extent of controlling the internal affairs of such association."

In New York Life Ins. Co. v. Head, 234 U. S. 149, it was held that the license by Missouri of a foreign corporation to do business within its borders did not

confer upon the courts of that state the power or authority to regulate or control the acts of such corporation beyond its borders. The Court in that case, said:

> "But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so, as the proposition cannot be maintained *without holding* that because a state has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore, a state has power to *regulate* the business of such company *outside* its borders and *which* would otherwise be beyond the state's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a state has power to regulate its domestic concerns, therefore it has the right to *control the domestic* concerns of other states. It is apparent, therefore, that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the constitution are ephemeral and depend simply upon the *willingness of any of the states* to exact as a condition of a license granted to a foreign corporation to do business within its borders that the constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be

> decided not only that the constitutional limitations on state powers could be set aside as the result of a license, but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority."

If, as the Ohio Court holds in this case, the courts of the states at large have the power in a suit of this character to determine the validity of assessments levied by petitioner against the members of its safety fund department, then an assessment may be valid in one state and invalid in another, and the equality and mutuality in the plan of insurance contemplated and provided for in these certificates will be utterly destroyed. The right of the courts of the foreign state to adjudicate respecting the validity of assessments in a suit by a member of a foreign company or association was repudiated and in effect denied by this Court in Royal Arcanum v. Green, 237 U. S. 531, 541, where the late Chief Justice White, in delivering the opinion of the Court, said:

> "The contradiction in terms is apparent which would arise from holding, on the one hand, that there was a *collective* and *unified standard* of *duty* and *obligation* on the *part of the members themselves* and the *corporation*, and saying, on the other hand that the *duty of members* was to be tested isolatedly and individually by resort-

ing not to one source of authority applicable to all, but by applying many divergent, variable and conflicting criteria. In fact, their destructive effect has long since been recognized (Gaines v. Supreme Council R. A., 140 Fed. 978; Supreme Council R. A. v. Brashears, 89 Md. 624, 43 Atl. 866). And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an *assessment*, which *was one thing* in *one state* and *another in another*, and a *fund* which was *distributed* by *one rule in one state* and by *a different rule somewhere else*, would, in *practical effect, amount to no assessment* and no substantial sum to be distributed."

III.

A Court Cannot Control or Regulate the Acts of a Foreign Trustee in the Management of a Foreign Trust.

In the levy of assessments against Douds and other members of its safety fund department, petitioner was merely acting as trustee for its members, and the assessments when received are merely held in trust by it for the payment of the death losses for which the assessment was levied. The amount, method or manner of such assessments have to do with the administration and operation by petitioner, as trus-

tee, of this trust, over which the courts of Connecticut have sole and exclusive jurisdiction. It was so held by this Court in Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, in which it was said:

> "Manifestly, the question as to the ownership and *proper administration* of the fund could not *be left at large* for *collateral* decision in *every suit on certificates* held by those who had failed to pay the assessment. For whether the members of the 'Safety Fund Department' are regarded as occupying a position analogous to that of shareholders, *or are treated as beneficiaries of trust property* in the hands of the company, *as trustee*, in the *State of Connecticut*—the courts of *that state* had *jurisdiction of all matters relating to the internal management of the corporation* (cases). It was for the court of the state where the *company* was *chartered* and *where the Fund was maintained* to say *what was the character* of the members' interest—whether they were entitled to have it distributed in cash, or used in paying the next assessment, or retained as a fund for the prompt settlement of claims with the right and duty on the part of the company, as their *trustee*, to replenish the same by collections from succeeding assessments."

In 22 Encyc. of Pl. & Pr., p. 21, it is said:

> "A court of equity has no control over a trust fund where the trust was created and the trust fund delivered *in another state* of which the trustee is a resident."

In Lines v. Lines, 142 Pa. St. 149, 21 Atl. 809, the Court, in holding that the courts of Pennsylvania had no power or jurisdiction to regulate or control the management of a trust estate located in New York, said:

> "It is almost *needless to say* that the Court of Common Pleas of Northampton County (Pa.) *has no jurisdiction of a trust when both the trustee and the trust estate are in another* state."

If, as was held by this Court in the Ibs case, *supra*, all questions appertaining to the proper administration by petitioner as the trustee of the Mortuary Fund are *within the exclusive jurisdiction* of the courts of Connecticut, then necessarily, these questions are *without the jurisdiction of other states.* The petitioner in levying these assessments was engaged in the *performance of its duties as trustee in Connecticut*, and complaints of members, the *cestui que trust*, should be determined, if the orderly administration of justice is to be preserved, by the courts of *Connecticut*, and not by the courts of Ohio. Whether or not petitioner exceeded its authority as trustee in the levy of the assessments complained of in this suit was for the Connecticut courts to decide, and the courts of Ohio, in holding and determining that the assessments in question were excessive and in rendering judgment against petitioner for the

amount of the alleged excess of these assessments paid by Douds, undertook to extend their jurisdiction and power beyond the territorial limits of that state and to usurp the power and jurisdiction which belonged exclusively to the State of Connecticut.

IV.

Connecticut Has Ruled Contrary to Ohio in the Matter Here in Controversy.

Not only have the Connecticut courts exclusive jurisdiction of the subject matter of this suit, but, as will appear from the opinion of this Court in Hartford Life Insurance Co. v. Ibs, 237 U. S. 662, 668, the Connecticut Courts have *already taken* jurisdiction and *are now exercising jurisdiction* over this *trust and the trustees*. As shown by the opinion of this Court in the Ibs case a suit was instituted in 1908 by one Charles H. Dresser and several other members of the Safety Fund Department against your petitioner in which it was claimed, among other things, that your petitioner was levying assessments against them which were excessive (page 667). In the decree in that suit, the Connecticut Court directed *how* the assessments should be levied, placed *limitations* upon petitioner, as trustee, in the levy of such assessments and directed that *if the assessments* levied should, notwithstanding, produce to the Mortuary Fund a

greater sum than was necessary, *the excess of such fund should be returned to the members by reduction in the amount of succeeding assessments*, and not as the Ohio Court holds in this case, by the return of such excess to the members in cash. In its consideration of the decree of the Connecticut Court in the Dresser case, this Court, in the Ibs case, said (237 U. S. 668):

> "In reference to the mortuary fund, the trial court found that, though acting in good faith, the company, in making assessments, had overestimated the number of lapses in membership, and, consequently, the assessments had raised more than was needed to pay claims; that these excesses or margins had accumulated and amounted to many thousands of dollars; that these excess collections were in the mortuary fund, and 'are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed.
>
> "'The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate holders, but it is held that it is proper and reasonable that the company should hold such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that pur-

pose that the company should hold more than the amount of one average quarterly assessment for the previous year.

"' * * * The mortuary fund arising as above described or from any other source, together with all income or interest thereon, belongs to the men's division of the Safety Fund Department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department, and *that any excess above the average of the quarterly assessment for the previous year shall be distributed in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.*'"

Yet the Ohio Court, disregarding the exclusive jurisdiction possessed, invoked and exercised by the Connecticut Court, proceeds to determine what are valid assessments and having held these particular assessments invalid requires the repayment thereof *in cash*, and not by way of *credit on future assessments*—all quite contrary to the Connecticut Court's decree.

Now, which mandate shall this trustee obey? And, obeying one, how can it avoid, at least seemingly, contempt for the other? The petitioner is in the Straits of Messina, with Scylla on the one side and Charybdis on the other, with no chance to trim its sails so as to enter the sea of smooth sailing, unless this Court

shall say, as we think it should say, that judicial acts of a foreign state over a nonresident trustee already subject to the direction of a court of competent jurisdiction at the situs of the trust and the residence of the trustee, is not process of *law*, and, therefore, not *due* process of law, because to *assert* jurisdiction over a subject matter, jurisdiction over which lies exclusively with another court and which has already been lawfully exercised by such other court, is the mere *assertion* of jurisdiction and not the *exercise* of jurisdiction.

Unless the petitioner, being *controlled by* the Connecticut courts, is thereby *protected from contrary judgments and decrees* of courts of other jurisdictions (and that protection can only be had through this court), then it must submit to being rent asunder by the conflicting views of the various and variant courts of the different states as to how it shall levy assessments—a periodically recurring act necessary to the discharge of its trust. An assessment cannot be levied several ways or by several methods or formulas at one and the same time. It can only be levied in *one* of these several ways. If each state is left free to declare an assessment void unless levied as it may chance to fancy it should be levied, then the petitioner is required to do the impossible and levy each assessment in as many different ways as there are states and courts within these states and

its position becomes quite intolerable—and all because the jurisdiction exercised by Connecticut is impinged upon the courts of other states.

V.

The Accounting.

The Ohio Court refused to follow the cases heretofore cited which held that where accounting is necessary the foreign court cannot proceed. It undertakes to distinguish this case from the cases cited. The ground of the distinction is that in the cases cited an examination of the books and records of the foreign company *was necessary.* In this case (so says the Ohio Court) an examination of the books and records was *not necessary BECAUSE* in *this case* the *plaintiff proved* his contention that the assessments were excessive *without resorting to the company's books.*

Briefly, the Court holds that though the case be one in which an accounting *should* be had, yet if one party can, in a particular case, give evidence *tending to prove* his contention, this *evidence* changes the *character of the action*—it ceases to become an action for accounting—no accounting is necessary—and *therefore jurisdiction obtains in foreign court.*

We submit:

First. The action being necessarily one for accounting, it does not cease to be an action for ac-

counting because of an evidence introduced by either party.

Second. That in an action for accounting the defendant has a constitutional right to be exempted from *accounting in* a foreign jurisdiction, and this exemption should not be denied it, although the plaintiff may be able to offer *proof as to his contention* in the foreign jurisdiction. The defendant also has the right to offer *proof as to its contention*, and to make this proof from its *books and records at its domicile*, and is not required to leave its domicile to make that proof elsewhere.

Furthermore, it is the petitioner's insistence that the evidence in this case was insufficient to justify the finding of the Referee, to whom the cause was referred to take an accounting, and the judgment entered upon such finding, that the assessments were excessive, and that the excess thereof amounted to the sum of one thousand eight hundred fifty-seven dollars and fifteen cents ($1,857.15).

The basis of Douds' complaint in this regard is that in the table of rates incorporated in the certificate there was no rate of assessment specified therein beyond the age of sixty, and that, therefore, he could not lawfully be assessed in excess of the rate of two dollars and sixty-eight cents ($2.68) (the rate at age sixty), from and after reaching sixty years of age,

and that he was in fact assessed in excess of that rate after reaching that age.

The table of rates referred to is entitled in this certificate as the "Table of Graduated Assessment Rates for Death Losses for Every $1,000 of a Total Indemnity of $1,000,000"; and at the bottom of this table is the following provision (Rec., p. 17):

> "These rates *decrease* in proportion as the total *indemnity* in force *increases* above one million dollars in amount, and are calculated so as to cover the usual expense of collecting."

The rates specified in this table are, therefore, the rates of assessment at each age therein for each individual death loss of $1,000, upon the basis of one million dollars of outstanding indemnity, or insurance, in force at the time of the assessment, and if the indemnity or insurance in force exceeds one million dollars, the rate of assessment is proportionately decreased. Where there is more than $1,000 of outstanding death losses to be assessed for, the rate of assessment is correspondingly increased.

Therefore, if but one death occurs on a certificate for $1,000, during the quarter for which the assessment was levied, and the total indemnity or insurance in force is but one million dollars, the rate charged against the member, who is sixty years of

age, is two dollars and sixty-eight cents ($2.68); but if ten deaths occur on policies of $1,000 each, so that there is $10,000 of death losses, with only one million dollars of insurance in force, then the rate of assessment is twenty-six dollars and eighty cents ($26.80). If but one death occurs, representing a $1,000 death loss, and there is ten millions of insurance in force, then as the assessment "decreases in proportion, the total indemnity increases above $1,000,000," the rate will be one-tenth of $2.68, or $0.268, whereas if there are twenty deaths (representing $1,000 each, or $20,000.00), the rate would be twenty times $0.268, or $53.60.

Manifestly, therefore, if the assessment is levied in accordance with the terms of the certificate, it would be absolutely necessary to know (1) the amount of the outstanding death losses, (2) the amount of insurance or indemnity in force, and (3) the respective ages of the members holding such insurance at each of the assessment periods. What were the facts with respect to these several matters? The record is absolutely silent.

The plaintiff sued *on the contract* and alleged he had been assessed in an amount in *excess of that provided by the contract.*

His *proof* was that the assessments were levied in a manner different from that provided by the contract.

But there was *no proof* that by levying these assessments in a manner different from that provided in the contract he was required to pay an amount in excess of that which would have been demandable *if the assessments had been levied in the manner provided in the contract.* Whether the assessments actually levied were larger or smaller in amount than they would have been if they had been levied strictly in accordance with the contract, it is impossible to say. That would depend upon the amount of death losses, the amount of the insurance in force, and the ages of the members holding such insurance at each of the assessment periods. This could *only* be *ascertained from an examination of the company's books and records.* And such examination *in invitum,* can be had *only at the domicile of the defendant corporation.*

Even if the excessiveness of the assessments is to be determined by proved *practice* of the Company, and not by the *contract provisions* in respect thereto, the evidence is still *insufficient* to support the finding that they were excessive in the sum of $1,857.15. The practice proved is set forth in the report of the Connecticut Insurance Department, introduced in evidence by plaintiff, as follows (Rec., p. 110):

> "By an accurate calculation, the exact amount which will be produced by an assessment of one

rate, as published on the back of the certificate at the allowed age of member whose certificate is in force, is ascertained. This sum is then divided into the whole amount of death claims which have accrued in the quarter, and the quotient is the factor which we call the ratio. The ratio is the number of times the rate which it is necessary for each member to pay, in order to make up the full sum of death claims approved."

Assume that this is the practice. Then let us suppose, for instance, that the death losses to be assessed are $1,000; that the amount of insurance outstanding is $100,000, $50,000 of which was held by members who are 39 years of age, at which age the rate is $1.00 (Rec., p. 17), and that the remaining $50,000 of insurance is held by members who are 59 years of age, at which age the rate is $2.50 (Rec., p. 17).

The amount (on these assumptions) which would be realized by an assessment at one rate at age 36 would be 50 x $1.00, or $50.00, and at age 59 would be 50 x $2.50, or $125.00, or a total of $175.00. Dividing the latter amount into the outstanding death losses of $1,000, the quotient or "ratio" would be 5.7; which is the number of times the rate which the member would be required to pay for each $1,000 of insurance held by him as his pro rata share of the outstanding death losses.

At the hearing before the Referee there was produced and identified, on the part of plaintiff, the "ratios" used by petitioner for each of the quarterly assessments complained of (Rec., p. 85). By multiplying the rate at age 60, i. e., $2.68, by the ratio, he was able to show that the rate at which he was actually assessed varied from $2.68 at age 60 to $4.00 at age 65, from which time on it remained fixed at $4.00 (Rec., pp. 39-43). But in arriving at the amount produced by an assessment of one rate in order to determine these ratios, the company assessed Douds, and every other members of age 60 and above, *at rates* varying *from $2.68* at age 60 *to $4.00 at age* 65, and upwards, which necessarily resulted in a larger amount being realized as the proceeds of an assessment at *one rate* than would have been the case if the rate for members of 60 years, and above, had remained fixed *at $2.68*, and consequently the ratios actually used by the company in the assessments complained of were smaller than they would have been had the assessments been based on the rate of $2.68 for members of age 60, and above.

In other words, the levy of an assessment based upon the rate of $2.68 for age sixty, and above, would produce a *smaller* amount as the *proceeds* of an *assessment* of *one rate*, and consequently a *higher* rati,o, than would be the case where, as here, the assessment was based on rates varying from $2.68 at age

sixty to $4.00 at age sixty-five, and above. Manifestly, therefore, if it was improper for petitioner to assess Douds in excess of $2.68 upon and after reaching age sixty, then necessarily the "ratios" used in determining and arriving at the amount of the alleged excess of these assessments were not the correct or proper "ratios." The correct ratios would have been higher than those actually used; how much higher, or what the difference in the amount of the assessment would have been, it is impossible to say, because the record is silent as to those facts which it is essential to know before the proper ratio could be determined, i. e., the amount of outstanding insurance, the respective ages of the members, and the amount of insurance held by them, and the amount of the death losses at each of the respective quarterly assessment periods throughout the twenty years during which Douds claimed that he was being unlawfully assessed. The ascertainment of this data would manifestly require an examination of petitioner's books and records covering this twenty-year period, *and this examination it can only lawfully be required to enter into at its domicile.*

Thus it is quite apparent that petitioner has been mulcted in a judgment, which should only be rendered after an *accounting had,* and in an action for an accounting, and this because although the plaintiff sued *for* an accounting, yet because, forsooth, at the hear-

ing he gave some evidence that would be pertinent on an accounting and thus proved (to an extent) his allegations, and the petitioner proved nothing; therefore it is held either that no accounting is necessary or one has been had.

An accounting means an examination of accounts and a conclusion based thereon.

Here there was no investigation of accounts, but a conclusion based on evidence that has nothing to do with accounts.

The petitioner, on the facts charged should doubtless be required to *account*, but it should only be so required in its domicile.

Respectfully submitted,

HARRY B. ARNOLD,
JAMES C. JONES,
FRANK H. SULLIVAN,
JAMES C. JONES, JR.,
Counsel for Petitioner.

INDEX.

Beale on Foreign Corporations, Sec. 307 11
Castagnino et al. v. Mutual Reserve Fund Life Association, 157 Fed., 29 15
Clark and M. Private Corporations, Sections 864, 865. 11
Condon v. Mutual Reserve, 98 Md., 99, 42 Atl., 944 13
Dresser v. Hartford Life Insurance Company, 80 Conn., 681 19
Everhart v. Northwestern Life Insurance Company, 210 Fed., 520 14
Frick v. Hartford Life Insurance Company (Iowa), 159 N. W., 247, 250, 251 12
Gaines v. Royal Arcanum, 140 Fed., 978 16
Hartford Life Insurance Company v. Ibs, 237 U. S., 665 13
Mt. Vernon-Woodberry Cotton Duck et al. v. Alabama Interstate Power Company, 240 U. S., 30 9
Richardson v. Ainsa, Administrator, 218 U. S., 288-289 9
Royal Arcanum v. Green, 237 U. S., 531 16
Sauerbrunn v. Hartford Life Insurance Company, 220 N. Y., 363; 143 N. Y. Supp., 1009 16
Westminster National Bank v. New England Electrical Works, 3 L. R. S. (N. S.), 551, 555 11

IN THE

Supreme Court of the United States

October Term, 1922.

Hartford Life Insurance Company, Petitioner, vs. Frank F. Douds, Herman J. Douds, and Rebecca E. McConkey, Executors, etc., Respondents.	No. 265.
Hartford Life Insurance Company, Petitioner, vs. Robert H. Langdale, Respondent.	No. 271.

BRIEF OF SOLICITORS FOR RESPONDENTS.

The following brief and argument will include both of the foregoing cases as they are of the same nature, involve the same questions, and the same proceedings have been had in each, and they may be treated together under

the same principles and authorities. We ask, pursuant to Paragraph 8 of Rule 26 that they may be heard together.

The plaintiff below, seeks to compel the defendant, insurance company, to observe, according to their terms, certain membership certificates, or policies, which he holds in the safety fund department of the defendant company; and to require from the insurance company to account for and pay back certain payments claimed by him to have been made in excess of those stated in his contract; and he also prays for an injunction to restrain the defendant from demanding and collecting alleged excessive payments, and from lapsing his membership.

The only distinction made between the two cases is that in the Langdale case, the policy holder being still in full life, has had his certificates or policies of insurance forfeited, by reason of non-payment of such excessive assessments charged against him by the defendant company.

In the first of the above entitled causes, Alonzo J. Doud, since the commencement of this action, has deceased, but he and his personal representative have complied with all the terms of his certificate or policy of insurance, and his action is distinct from the Langdale action in that he seeks to recover, in equity, the amount of his excessive payments, he having kept his insurance in full force.

I.

HISTORY OF THE TWO CASES.

The steps incident to the prosecution of these cases are here given.

Both actions were begun in the Court of Common Pleas in the month of November, 1916; the Doud case on the first, and the Langdale case on the thirteenth of that month. (Record, 3.)

In the month of December, 1916, the defendant specially appeared in the cause for the purpose of filing a demurrer to the jurisdiction. This demurrer was amended and thereafter argued and submitted.

In the month of May, 1917, the Court of Common Pleas overruled the demurrers and gave defendant until May 26, 1917, in which to plead to the petition.

The defendant thereafter pleaded specially to the jurisdiction.

In cause number 73462, the defendant, by original action in prohibition, commenced in the Supreme Court of Ohio, May 27, 1917, further tested the question of the jurisdiction of the Court of Common Pleas. Issue was joined by answer in that court and such answer was demurred to and the demurrer thereafter by the Supreme Court was overruled.

Error proceedings in the action in prohibition were begun in this court. In this action a motion was filed by the plaintiffs, who had then become a defendant in error

in such error proceedings, to affirm the judgment of the Supreme Court of Ohio, and on January 28, 1918, judgment of this court was given dismissing the proceeding in error in the Doud case. The memorandum opinion in that case will be found in 245 U. S., 641.

The cause was then remanded and when the mandate reached the Supreme Court of Ohio and from that court to the Court of Common Pleas, the issues were made up and the order of reference was made.

The cause was heard before the referee, and a voluminous report was made awarding an accounting to each of the plaintiffs. Exceptions were thereafter filed to the report of the referee and by the referee overruled. Upon the report of the referee being filed in the Court of Common Pleas exceptions were again taken thereto and argued before that court, and thereafter at the September Term, 1919, the report of the referee was approved and confirmed and judgment and decree accordingly entered. A bill of exceptions was taken thereto, allowed and signed, and petition in error filed in the Court of Appeals of Ohio.

The Court of Appeals affirmed the judgment and decree of the Court of Common Pleas. (Record, 56.) November 15, 1921, judgment and decree of the Court of Appeals affirmed by the Supreme Court of Ohio.

For purposes of brevity, without tracing the particular steps in the Langdale case, it may be stated that the same procedure in detail was adopted in that case as in the Douds case. It has also been carried from the Supreme Court of Ohio to this court, and jurisdiction of this court denied, **in certiorari**, at the October Term, 1918. (248 U. S., 562.)

From this point the two cases may be considered as identical and the discussion of the propositions involved will be made together.

POINTS, AUTHORITIES AND ARGUMENT OF SAME.

I.

The Question of Jurisdiction of the Courts of Ohio is not an Open One in These Cases.

Each of these cases have been before this court on writ of error and motion for writ of certiorari to the Supreme Court of Ohio (245 U. S., 641; 248 U. S., 562). Jurisdiction thereof was denied.

The applications for the writs of prohibition were predicated on the allegation that the trial court did not have jurisdiction of the subject of the action. The judgments and decrees of this court leaves the jurisdiction of the lower courts sustained. "The denial of the petition for a writ of prohibition is a final judgment in the suit and concludes the parties thereto." **Mt. Vernon-Woodberry Cotton Duck Co. et al. v. Alabama Interstate Power Company**, 240 U. S., 30.

"The decision of the Federal Supreme Court on a former appeal, that the lower court had jurisdiction of the case, is conclusive on a second appeal." **Richardson v. Ainsa, Administrator**, 218 U. S., 288-289.

II.

The Relief Here Sought not an Interference with the Internal Management of a Corporation.

If we are correct in the former proposition that the jurisdictional questions have been determined by this court, the proceedings of the lower courts in the assertion of such jurisdiction should likewise, by this court, be denied review, or if reviewed should be affirmed. (See discussion of jurisdiction in referee's report, Doud Record, pages 46-47.)

But as petitioner's argument, denying jurisdiction in the lower courts, is based upon "Interference with the Internal Affairs of Petitioner," and "Impossibility to enforce the decree of the Ohio courts," (Petitioner's brief, pages 14-39; Do, pages 39-42) we deny that the record sustains either of such contentions.

It was remarked by the Supreme Court of Ohio (Record, page 148), on this point, as follows:

> "If the developments of the hearing before the referee in the case at bar did not refute the assumption that a determination of the issues in this case required an exhaustive visitation and examination of the books of the company, and if the judgment in this case operated to regulate the discretion and internal management of the affairs of the company, we would feel constrained to follow the reasoning and conclusion of the courts in those cases and the authorities there cited. But in the case at bar the referee was able to and did make an accounting between the plaintiff in error and the defendant in error upon the contract of insurance and the assess-

ment calls issued to the defendant in error by the plaintiff in error, and upon the printed ratio for each such call and the rule for determining such ratio issued by the secretary of the plaintiff in error and supplied by a former general agent of the company."

For referee's findings thereon see Record, page 109.

The method of computation was furnished by the petitioner (Plaintiff's Exhibit "E," Doud Record, page 115; Plaintiff's Exhibit "F," Doud Record, page 116.)

There was existing no necessity for an elaborate examination of the "internal affairs of the company," in making the computation, as shown by the testimony of George D. Fry, general agent of the company at the time the policies were written. He made the computation according to the petitioner's own rule. (Doud Record, pages 117-124.)

Interference with the internal affairs of a foreign corporation is a question of fact. This is thus found against the company by the referee upon the testimony of its own general agent, and so declared by the Supreme Court of Ohio.

What constitutes interference with the internal management of a corporation is shown in Westminister National Bank v. New England Electrical Works, 3 L. R. A. (NS) 551, 555.

Citing Beale, Foreign Corporation, Section 307; Clark and M. Private Corporation, Sections 864, 865:

> "It cannot be controverted that a foreign corporation, legally made a defendant in an action upon a contract which it had apparent authority to make, cannot escape liability thereon upon the mere ground

that it is a foreign corporation. In such a case it enjoys no immunity or privilege not possessed by domestic corporations or individuals. If it has legally bound itself by a contract with a plaintiff who sues in his own right, and not as a stockholder or director of the corporation, the jurisdiction of the court to pronounce judgment against it cannot be questioned. The determination of its liability involves its external legal relations to one not in any way officially connected with it. * * *

"The question relates, not to its internal management or affairs, but to its obligations to others arising from the prosecution of its legitimate business; and ordinarily those obligations are enforcible wherever the corporation can be made a party to the action."

Frick v. Hartford Life Insurance Company (Iowa), 159 N. W., 247, supra, 250-251:

"The defendant has used a certain ratio on each assessment levied by it. The essential fact in taking this accounting asked by this plaintiff was simply the proving of that ratio in each particular instance; that is the ratio actually used by the defendant in each particular instance. The determining of this ratio actually used in each particular instance **in no way required the overhauling of the internal affairs of the defendant corporation,** but simply involved the proving of the fact as to what the defendant had actually done. That fact could have been proven, of course, by an examination of the defendant's books and records, but the plaintiff found another way of proving these facts as the decree of the court shows that it had these facts before it when it entered the decree. From the facts which the plaintiff was able to produce in evidence before the court in proving up his case, the court was able to take this accounting itself without the necessity of compelling the production of books and papers, or with-

> out the necessity of referring the matter to a referee. It is apparent, therefore, that no interference with the internal management of the affairs of the defendant corporation was required."

The petitioner relies upon **Condon v. Mutual Reserve,** 89 Md., 99, 42 Atl., 944, and **Hartford Life Insurance Company v. Ibs,** 237 U. S., 665. Examination thereof shows they are not authorities herein.

In Condon v. Mutual Reserve, in addition to the other relief asked for, a receiver was also sought.

No receiver is asked for in this case, for a foreign company, nor could there well be.

Furthermore in that case, the assessments were to be made

> "at such rates according to the age of each member, **as may be established by the said Board of Directors. It was furthermore declared that the contract should be subject to all the provisions and stipulations contained in the constitution and by-laws of the association, with the amendments made or that may hereafter be made thereto.**"

This provision placed in the hands of the directors a broad discretionary power and the right by the subsequent adoption of by-laws, to change the assessments. This was a matter discretionary with the directors and which discretion could not be controlled by a foreign court.

This decision is one of many which might be cited from cases determined in favor of mutual insurance companies or fraternal beneficiary societies, **when the right to modify the contract is reserved to the company by the**

express provisions of the by-laws or the terms of the policy certificate.

There is no claim made here that any such provision is contained in the by-laws or in the certificate in the instant case.

In Hartford Life Insurance v. Ibs, the question involved was whether the appellee was bound by the decision of the Supreme Court of Connecticut in Dresser v. Hartford Life Insurance Company, she not being a party, the action in Connecticut being a representative action. The question determined in the Dresser case being that the insurance company had the right to maintain a mortuary fund and use the fund to pay death losses.

Eliza Ibs claimed that as she was a resident of the State of Minnesota, and not a party to the Dresser case in Cincinnati, she was not bound by the decree in that case.

The question arose on the full faith and credit provision of the Federal Constitution. It was held by the United States Supreme Court, that, as the suit was brought against the company by a number of certificate holders for the benefit of all, the company had the right to pay its death claims in the manner provided and that the decree of the Connecticut court having been rendered in a representative suit, was proper evidence in a suit brought by a beneficiary against the company upon its certificate. In the case at bar, the full faith and credit provision of the constitution is not involved, but further in the Dresser case the Supreme Court of Connecticut held that this company had no right or authority to in-

crease the rate because it would be violative of the terms of the policy.

That opinion, as well as the opinion in the Dresser case, does not in any way militate against the respondents.

In the case of **Everhart v. Northwestern Life Insurance Company,** 210 Federal, page 520, cited in relator's brief, page 10, the action was for an accounting into the entire operation of the company and the method of handling its funds. The petition sought an accounting upon policies of every kind issued by the company. It also sought an injunction against the officers of the company and for a receiver to take charge of the fund and to distribute the same among the various policy holders.

It was held that this involved the internal management of affairs of the corporation, and the relief was denied. That court, by Judge Day, said:

> "If this were a suit asking only **for the interpretation of a policy of insurance the complainants might well have recourse to this court because it is only just and fair that a citizen of Ohio who takes a policy in a foreign corporation, after the company has agreed that service of process in Ohio might be made upon it, have their resort to the courts of Ohio for redress.**"

It seems to us that is what the plaintiff in the case at bar is seeking to do; that is to have his rights interpreted under the contract and preserved.

It is very obvious that in all these classes of cases the relief sought went far beyond the relief sought in this case.

In Castagnino et al. v. Mutual Reserve Fund Life As-

sociation, 157 Fed., 29, the C. C. A. of the 6th Circuit held:

> "It is not necessary to take the view that, in order to construe and enforce a policy, there must be interference with the internal management of the company. The internal management will go on as before, and there will be no interference with the constitution and by-laws or with the lawful authority of the officers of the corporation. In construing a policy it is not necessary to interfere with the proper discretion of the officers. Where there is discretion, the officers will be allowed full range; it is only where there is no discretion and the act is clearly unauthorized and wrong that the law will interfere."

That is exactly the case at bar.

Gaines v. Royal Arcanum, 140 Fed., 978, and **Royal Arcanum v. Green**, 237 U. S., 531, might also be cited.

This, and all similar cases cited from fraternal insurance company law are not in point because each and all of such companies retain in their by-laws and certificates the express authority **to vary the contract** by the subsequent enactment of by-laws including the right and authority to increase the size and amount of the assessments.

These are the leading cases relied upon by the petitioner, excepting the case of **Sauerbrunn v. Hartford Life Insurance Company**, 220 N. Y., 363. We cite the same case in 143 N. Y. Supp., 1009. We concede that the Court of Appeals of 220 N. Y. Reports, 363, has reversed the Supreme Court in the foregoing case, **but solely** upon the question of lack of jurisdiction. It does not affect the language used by the Supreme Court of New York in

commenting upon the requirement of the defendant company to adhere to the table of rates endorsed upon the policy and made a part of it. The question of jurisdiction of the courts of Ohio is not an open one, we insist, to be considered.

However, there are the following distinctions to be made between the instant case and the Sauerbrunn case, as shown by the opinion at 220 N. Y. Reports, 363:

(a) Defendant here has answered and submitted the issue to the court by answer. In the Sauerbrunn case the defendant did not answer (supra, page 366).

(b) The present case was heard on the evidence. The Sauerbrunn case was not so heard. (Page 366.) No evidence was offered by the company. The defendant did not appear by counsel, here it did appear by counsel.

(c) In the Sauerbrunn case it appeared that the order and decree of the Supreme Court of the State of New York could not be enforced against the corporation **without its consent.** Here it can be enforced by virtue of the statute governing foreign insurance companies.

When the court comes to consider the case of Frick v. The Hartford Life Insurance Company, 155 N. W. 247 (Iowa), the court will adopt the reasoning of the Supreme Court of Iowa in preference to that of the Court of Appeals of New York, should there be an apparent conflict between the two. Observe the following quotation from the opinion in the Iowa case:

> "From the facts which the plaintiff was able to produce in evidence before the court in proving his case, the court was able to take the accounting itself, without the necessity of compelling the produc-

> tion of books and papers. * * * It is apparent, therefore, that no interference with the internal management of the defendant corporation was required."

The whole argument of the Court of Appeals of New York in the Sauerbrunn case proceeds upon the theory that the accounting cannot be had without the presence of the books and papers of the defendant company, and that the decree of the court could not be enforced. Both of these results are shown to be in the instant case, without foundation in fact or in law so far as applied to the situation of these plaintiffs, residents of the State of Ohio.

As to the second contention of the petitioner regarding the inability of the courts of Ohio to enforce its decree, this is fully answered by the Supreme Court of Ohio by a review of the statutes of Ohio in that regard. (Bottom page of Record, 150, 151.)

Petitioner devotes eight pages of its brief in challenging the accuracy of the method of accounting adopted by the referee and approved by the Ohio courts. (Petitioner's brief, pages 46-54.)

We have pointed out that the method of computation adopted by the referee was from the rules promulgated by the insurance company and computation made by its general agent therefrom. But independent thereof, what merit can there be in petitioner's contention **when it offered no evidence whatsoever at the hearing of the causes?** An argument to this court by the insurance company to disregard a computation made pursuant to its own rule and by its own agent, without offering any evidence to rebut the same savors of a lack of ethical, as well as legal consideration.

III.

Consideration of Dresser v. Hartford Life Insurance Company, 80 Conn., 681.

The policy in question provides a table of graduated assessment rates, which are fixed and definite, as follows (Record, page 100): "These rates decrease in proportion as the total indemnity in force increases above one million dollars in amount, and are calculated so as to cover the usual expense for collecting." In the above case, 80 Conn., 681, the Supreme Court of that state held that the company in making assessments is bound by the tables of rates stipulated in the policy, and cannot above the age of sixty years levy an assessment in excess of $2.68 under the contract in question. In construing the contract, a duplicate of those involved herein, that court said: "It is expressly stated that these ratios will decrease as the total amount of the outstanding insurance increases. **It is not suggested that they can ever be increased. It must be held that they cannot.**"

We do not deny, as was done in the Ibs case (237 U. S., 665), the binding force and effect of that decision by that court, upon these respondents. We rather invoke the rule against the company, as above quoted. We refer this court to an expression of the Supreme Court of Ohio (Record, page 151), as follows:

> "**The plaintiff in error in disregard of such decision, has placed upon the contract an interpretation which permits it to do that very thing that that court** (the Supreme Court of Connecticut) **declared**

it could not do. Since the plaintiff in error has so lightly regarded the courts of its own state in this respect, its contention that it ought not to respond to the process of a court other than courts of Connecticut does not appeal to the conscience of this court."

As a matter of fact, petitioner had blanks prepared (Exhibit "A," Record, 125) for the purpose of having the policy holders sign the same agreeing to the excessive assessments. Its agent, (Record, page 118) was directed to present to the plaintiffs to have them agree to the four dollar ($4.00) rate of assessment instead of two dollars and sixty-eight cents ($2.68), but they each objected to signing or consenting to any such rider upon their policy. What inference should be drawn therefrom?

In conclusion we consider it but fair argument to give to this court the apparent motive of the company in carrying out this exhausting litigation with its policy holders for more than seven years. By examination of the so-called Trustees' Contract (Record, 33 et seq.), it appears that if the policy holders cease paying, surrender their policies, or sever the contractual relations between the petitioner company and themselves, and if the safety fund should fall below one million dollars ($1,000,000.00), it becomes the absolute property of the petitioner company. Its last published report, December 31, 1921, shows it to have a balance of $1,000,966.50. Therefore, it would follow, as commented upon by the Supreme Court of Ohio, (Record, p. 150) "If we adopt the theory of the plaintiff in error that under the contract, notwithstanding

the table of rates expressly made a part thereof, it may make any assessment in excess of such rate necessary to pay the death claims accruing under the safety fund department of the company, it will logically follow that the rate may be increased as the number of outstanding policies decreases until the point is reached **where there is but one assessable policy outstanding,** which may be assessed the full amount of the death claims then existing, and when that policy holder dies there shall be paid from the million dollar safety fund the amount of such policy **less certain specified items of expense, and the balance of the safety fund, amounting to approximately $999,000.00, will become the absolute property of the plaintiff in error, and while the disposition of the safety fund is not before this court at this time, and probably never can be before the courts of this state, yet in arriving at a construction of the contract within the jurisdiction of this court, the effect of any proposed construction concededly without its jurisdiction is a proper subject for consideration in so far as it has a bearing upon the contract within its jurisdiction."**

Under the circumstances the right of a court of equity to grant the relief prayed, is beyond question. The judgment and decree of the Supreme Court of Ohio should be affirmed with costs.

Respectfully submitted,

SMITH W. BENNETT,

HUGH M. BENNETT,

Solicitors for Respondents.

Columbus, Ohio.

Supreme Court of the United States

OCTOBER TERM, 1921.

Hartford Life Insurance Company,
Petitioner,
vs.
Frank F. Douds et al., Executors of
Alonzo J. Douds, etc.,
Respondents.
No.————

Hartford Life Insurance Company,
Petitioner,
vs.
Robert H. Langdale,
Respondent.
No.————

MOTION OF RESPONDENTS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' MOTION.

Now come the respondents and move the court to dismiss the petition of petitioner for writ of ceritorari in each of the above entitled cases on the grounds:

1. That it is manifest from the transcript of the record filed herein by the petitioner, and upon consideration of the petition for the writ of certiorari that its proceeding was taken for delay only, and the questions on which the decision of the case depend are frivolous.

2. That the record shows an answer was filed by the respondents presenting issues which were and are independent of any federal question, and which were considered by the Supreme Court of Ohio and decided against said petitioner.

SMITH W. BENNETT,
Solicitor for Respondents.

BRIEF OF ARGUMENT OF RESPONDENTS.

STATEMENT OF CASE.

The foregoing motion and the following brief and argument will include both of the foregoing cases, as they are of the same nature and the same proceedings have been had in each of the cases, and they may be and have heretofore been heard together, involving the same principles and authorities. The respondents seek to compel the petitioner, insurance company, specifically to perform, according to their terms, certain membership certificates or policies which they hold in petitioner company; and to require from the company to account for and pay back certain payments claimed by them to have been made in excess of those agreed to in their contracts. They also pray for an injunction to restrain the petitioner herein from demanding and collecting alleged excessive payments and from lapsing their membership.

The only distinction between the two cases is that in the Langdale case, the policyholder being still in full life, has had his certificates or policies of insurance forfeited by reason of non-payment of excessive assessments charged against him by the petitioner company.

In the Douds case, Alonzo J. Douds, since the commencement of the action has deceased, but he and his personal representative have complied with all the terms of his certificate or policy of insurance, and his action is distinct from the Langdale action in that he seeks to

recover in equity, the amount of his excessive payments, he having kept his insurance in full force.

The actions were filed in the month of November, 1916, in the Court of Common Pleas of Franklin county, Ohio.

The table of rates contained in the respective policies provide that the plaintiff below should pay certain graduated assessments until he arrived at the age of 60 years, at which age he was required to pay $2.68 per payment of each $1000 of insurance; that after said age was reached said rate of $2.68 per assessment, by the language of the policies, **are to remain fixed and constant.** That the respondents were each compelled to pay an excessive rate of $4.00 per assessment from and after the time they arrived at 60 years of age.

The steps incident to the prosecution of these cases are here given so as to advise the court that these proceedings are taken for delay only and that the questions relied upon by the petitioner are frivolous, and this court has heretofore refused to entertain either of said causes.

A. Both cases were begun in the Court of Common Pleas in the month of November, 1916.

B. In December, 1916, the insurance company, specially appearing in the cause, filed a demurrer to the jurisdiction. This demurrer was special and thereafter was argued and submitted.

C. In May, 1917, the Court of Common Pleas overruled the demurrers and gave defendants until May 26, 1916, in which to plead to the petition.

D. The defendant company thereafter pleaded specially to the jurisdiction.

E. The defendant company, during the pendency of the action in the Court of Common Pleas, began an original action in prohibition in the Supreme Court of Ohio, May 27, 1917, and that court decided the question of the jurisdiction of the Court of Common Pleas. Issue was joined by answer in the Supreme Court, demurrer was filed to the answer, and the demurrer thereafter by Supreme Court, at the September Term, 1917, **was overruled.**

F. Error proceedings were then begun in the Supreme Court of the United States to the judgment of the Supreme Court of Ohio. In that action a motion was filed by these respondents, who had then become defendants in error in such error proceedings, to affirm the judgment of the Supreme Court of Ohio. On January 28, 1918, this court dismissed the proceeding in error. The memorandum of opinion in the case is found in Vol. ——, U. S. Supreme Court Reports, page ——, under date of March 15, 1918.

G. The cause was then remanded, the issues were made up in the Court of Common Pleas and an order of reference was made to a referee to take the evidence and report thereon his conclusions of law and fact.

H. The cause was heard before George B. Okey, Esquire, referee, and a voluminous report was made finding for each of the plaintiffs below. Exceptions were thereafter filed to the report of the referee, and by the referee overruled. Report being filed in the Court of Common Pleas—exceptions were again taken thereto and argued before that court. At the September Term, 1919, the report of the referee was approved, affirmed, and judg-

ment and decree accordingly entered thereon. A bill of exceptions was taken thereto, allowed and signed and petition filed in the Court of Appeals of Franklin county.

I. Without tracing the particular steps in the Langdale case, with dates as above set forth, it may be stated that the same procedure was adopted in that case as in the Douds case, which has also been carried through the Supreme Court of Ohio and the Supreme Court of the United States, where the judgment of this court was entered dismissing the same. (See Vol.———, page——, of the U. S. Supreme Court Reports.) Each of the foregoing cases were heard before the same referee and while the amounts differ in the respective findings and decree, yet the same facts and questions were involved.

J. The Court of Appeals of Franklin county, Ohio, affirmed the decree of the Common Pleas Court.

K. The Supreme Court of Ohio affirmed in an elaborate opinion the decree of the Court of Appeals of Franklin county. (See Vol. ——, Ohio Supreme Court Reports, p. ——.) These proceedings are again brought in this court for a writ of certiorari, which should be denied, for the following reasons:

1. The Hartford Life Insurance Company, by the practice complained of, violated its express contracts which fixed the assessment at $2.68 per assessment per $1000, by raising the same to $4.00 per assessment without the consent of the assured.

2. The Common Pleas Court of Franklin county, Ohio, had complete jurisdiction of the parties and the subject matter and such jurisdiction continued in the other courts of the State of Ohio.

3. The life insurance company, although organized

under the laws of Connecticut, was admitted to the State of Ohio to engage in its business therein, subject to the laws of the State of Ohio, and its contracts are within the protection of the courts of that state. Service of summons was made upon it pursuant to Section 9369, G. C., and 9380, G. C. There is no federal question presented.

4. The Supreme Court of Connecticut under whose laws the petitioner was created, has construed the contract in question and decided that the assessment cannot be increased above the amounts stated in the policy, without the consent of the assured. Dresser v. Hartford Life Insurance Company, 80 Conn, 681, from which we quote:

"The company could not increase the amount of the mortality clause above the amount stated in the application for insurance made a part of the certificate * * *

(Page 708) "It is expressly stated that these ratios will decrease as the total amount of outstanding insurance increase. There is no suggestion that they can ever be increased. **It must be held that they cannot.**" There is no question of "full faith and credit," herein, as in Insurance Co. vs. Barker, 245 U. S. 146.

5. These cases present merely a question of a corporation foreign to the state of Ohio, but admitted to do business in Ohio, violating its contracts therein, and by this proceeding seeking to divest the courts of Ohio of jurisdiction over it.

We append the following citation of authorities pertinent to the foregoing points:

State of Ohio on relation of Hartford Life Insurance Co., plaintiff in error, vs. Alonzo J. Douds, et. al., No. 581, United States Supreme Court, Vol. 245; pages 641, 2;

Hartford Life Insurance Co. v. Robert H. Langdale, 583 United States Supreme Court, Vol. 248, page 564;
Hartford Life Insurance Co. vs. Johnson, 249 U. S. 490-5;
Frick vs. The Hartford Life Insurance Company, 159 N. W. 247;
Harrison vs. The Hartford Life Insurance Company, 118 N. Y. Supp., 401;
Dresser vs. The Hartford Life Ins. Co., 80 Conn., 681;
Westminster National Bank vs. New England Electrical Works, 3 L. R. A. (N. S.) 551, page 555;
Guilford vs. Western Union Tel. Co., 59 Minn., 332 (50 Am. St. Rep., 407);
Eberhard vs. Mutual Life (D. C.) 210 Fed. 520;
Pfefer vs. Hartford Life Ins. Co. Niblac, Benefit Societies & Accident Insurance, 2nd Edition, p. 475;
General Code of Ohio, Sec. 9435.
General Code of Ohio, Sec. 9442.
Pearson vs. K. T. and M. Indemnity Co., 114 Mo. App., 283;
Covenant Mutual Life Association vs. Tuttle, 87 Ill. App. 309;
The Covenant Mutual Life Association of Illinois vs. Kentner, 188 Ill. 431;
Castagnine vs. Mutual Reserve Fund Life Association (C. C. A., Sixth Circuit), 157 Fed. 29;
Life Ins. Co. vs. Bernard, 33 O. S., 449.

CONCLUSION.

The motion of the respondents should be granted and the petition for the writs of certiorari should be denied.

Respectfully submitted,

SMITH W. BENNETT,
Solicitor for Respondents.